Indigenous-Municipal Legal Relationships: Moving Beyond the Duty to Consult and Accommodate

*Alexandra Flynn**

The duty to consult and accommodate has provided an important legal basis to challenge Crown action. While, federal and provincial governments have a clear duty to consult and accommodate when they contemplate conduct that might adversely impact potential or established Aboriginal or Treaty rights, there remains uncertainty as to the breadth and scope of the duties of municipal governments. Focusing on the Ontario planning context, this paper argues that the duty to consult and accommodate is an inadequate and problematic framework for long-term relationship-building as it has not led to sufficient recognition of the role of Indigenous communities. This paper first outlines the jurisprudence in relation to a municipal duty to consult and accommodate. Second, I address the limitations in the duty to consult and accommodate as a framework for Indigenous-municipal relationships, even though municipalities ought to be bound by the duty. I argue that this approach does not treat Indigenous communities as government partners, nor does it permit collaboration at the law-making stage. In support of this position, the paper focuses on the Ontario planning framework, concluding that it neither meaningfully incorporated Indigenous laws or notions of relationships, nor clarified the outstanding confusion on the role of municipalities. Third, I suggest that reciprocal, respectful relationships should

L'obligation de consulter et d'accommoder les peuples autochtones constitue une assise juridique importante pour contester les actions de la Couronne. Tandis que les gouvernements fédéraux et provinciaux ont une obligation de négocier et d'accommoder les peuples autochtones lorsqu'ils envisagent d'entreprendre des projets qui pourraient avoir un effet potentiel ou réel sur les droits ancestraux ou les droits issus de traités, l'étendue de cette obligation pour les gouvernements municipaux demeure sujette à débat. En utilisant l'exemple de l'aménagement du territoire en Ontario, l'auteure soutient dans cet article que l'obligation de consulter et d'accommoder fournit un cadre problématique et inadéquat pour le développement de relations à long terme puisqu'il n'a pas amené une reconnaissance suffisante du rôle des communautés autochtones. L'article commence par un survol de la jurisprudence relative à l'obligation de négocier et d'accommoder au niveau municipal. Dans un deuxième temps, l'article aborde les limites de l'obligation de négocier et d'accommoder comme cadre juridique des relations entre autochtones et municipalités. Bien que l'auteure croie que les municipalités devraient tout de même être soumise à l'obligation de consulter et d'accommoder, l'article montre que ce cadre ne traite pas les communautés autochtones comme de réelles partenaires gouvernementales et qu'il ne permet pas non plus de collaboration

* Assistant Professor, Allard School of Law, University of British Columbia. I am deeply grateful to Doug Anderson, Clara MacCallum Fraser, Mariana Valverde and Estair Van Wagner for their insights and feedback. Many thanks as well for the excellent suggestions from two anonymous peer reviewers. All errors and omissions are my own.

be at the foundation of any legal obligations between Indigenous peoples and governments, including municipalities, providing examples of municipal reforms such as the local adoption of the United Nations Declaration on the Rights of Indigenous Peoples.

à l'étape législative. À l'appui de cet argument, l'article se penche sur le cadre législatif relatif à l'aménagement du territoire en Ontario et conclut que celui-ci n'inclut ni le droit autochtone, ni les notions autochtones de relations, et qu'il ne clarifie pas non plus la confusion qui règne quant au rôle des municipalités. Troisièmement, l'auteure suggère que toute obligation juridique entre les peuples autochtones et les gouvernements, y compris les municipalités, devrait être basée sur des relations respectueuses et réciproques. Elle fournit en ce sens des exemples de réformes municipales potentielles comme l'adoption au niveau local de la Déclaration des Nations unies sur les droits des peuples autochtones.

Contents

1. Introduction 181

2. Acknowledgement 183

3. Canadian Governments Have a Duty to Consult and Accommodate 184

4. Uncertainty Over a Municipal Duty to Consult 187

5. Problems with the Duty to Consult in the Land Use Planning Context 193

6. Indigenous-Municipal Relationships as the Foundation of Local Planning Frameworks 199

7. Moving Forward in Indigenous-Municipal Legal Relationships 202

8. Conclusion 204

1. Introduction

Under Canadian law, federal and provincial governments have a duty to consult and accommodate when they contemplate conduct that might adversely impact potential or established Aboriginal or Treaty rights.[1] Appeal courts have concluded that the duty does not extend to municipal governments; instead, provinces may delegate procedural aspects of consultation to municipalities through legislation. However, as discussed later in this paper, some argue that recent Supreme Court of Canada decisions, coupled with scholarly analysis, mean that the duty to consult and accommodate may in fact apply to local governments. Although the duty to consult might seem like a step forward for municipal governments denied the status of Crown, this article will argue that municipalities should not adopt duty to consult jurisprudence as the principal basis to guide their relationships with First Nations. While the duty to consult has provided an important legal basis to challenge government action, it is an inadequate and problematic framework for long-term relationship-building.

This article examines the path forward for Indigenous-municipal relationships in regard to the land use planning process. While the arguments in the article apply broadly, they focus more specifically on the unique legalities of planning approaches in Ontario. The aim is to argue that municipal planning — using the example of the Ontario planning model more specifically — should not frame its responsibilities with First Nations and Indigenous Peoples based on the requirements of the duty to consult, which is a problematic singular framework for grounding a nation-to-nation relationship.[2] The duty to consult as the basis of Indigenous-settler relationships has not led to sufficient recognition of the role of Indigenous communities in the planning context. While the duty to consult and accommodate has indeed been used to ground some decisions that are positive for First Nations, in the end it is an honour-based duty of the Crown, one that is closer to *noblesse oblige* and that falls well short of the ideal of a nation-to-nation relationship.

The article highlights important initiatives taking place at the municipal level, including the local adoption of the *United Nations Declaration on the Rights*

1 This paper adopts the following terminology: "Indigenous Peoples" includes First Nations, "bands" as defined by the *Indian Act*, Inuit, Métis, and other Indigenous Peoples affected by municipal planning decisions. "First Nations" refers to Indigenous governments. "Aboriginal" refers to Indigenous Peoples and their rights as identified under Canadian law.

2 Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation" (2005) 23:1 Windsor YB Access Just 17; Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: University of Toronto Press, 1999); Val Napoleon, "Extinction by Number: Colonialism Made Easy" (2001) 16:1 CJLS 113.

of Indigenous Peoples (UNDRIP), as evidence of a truth and reconciliation-informed approach to understanding the process of working towards respectful, reciprocal relationships with Indigenous communities. The article advances that municipal governments should focus on respectful, reciprocal relationship-building as a legal standard in land-use decision-making; not benevolent colonialism's notion of the duty to consult, a duty that is said by the Supreme Court to be rooted in the "honour of the Crown."[3] Crucially, Indigenous leaders have acknowledged the importance of Indigenous-municipal relationships. For example, Indigenous leader RoseAnne Archibald has affirmed that while municipalities are not original parties to treaties, they are nonetheless "current and valuable partners, and certainly benefactors" of treaty processes, regardless of the Court's pronouncements of the ontology of the Crown.[4]

This article first outlines the legal obligations of municipalities in relation to the duty to consult and accommodate as it applies to planning decisions in Ontario. It references, in particular, the limitations related to Crown obligations to engage in consultation, the bifurcated jurisdictions created under Canadian law that require First Nations to respond to multiple governments independently, top-down decision-making that does not treat Indigenous communities as partners, and the uncertain role of municipalities. The second part of the article then notes the limitations in the duty to consult and accommodate as a framework for Indigenous-municipal relationships, even though municipalities ought to be bound by the duty. The article argues that this approach does not treat Indigenous communities as government partners, nor does it permit collaboration at the law-making stage. In support of this position, the article focuses on the Ontario planning framework, concluding that it neither meaningfully incorporated Indigenous laws or notions of relationships, nor clarified the outstanding confusion on the constitutional role of municipalities in relation to Indigenous-municipal legal relationships.[5] Finally, the article suggests that reciprocal, respectful relationships should be at the foundation of any legal obligations between Indigenous Peoples and governments, including municipalities. It provides several examples of municipal reforms that promote

3 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*].

4 RoseAnne Archibald, "Remarks by Ontario Grand Chief RoseAnne Archibald, Chiefs of Ontario" (11 September 2018), online: *Chiefs of Ontario* <https://www.youtube.com/watch?v=qKF5WNbgMU4> at 6:00. RoseAnne Archibald was elected National Chief of the Assembly of First Nations in July 2021 (Ka'nhehsí:io Deer, "RoseAnne Archibald elected 1st female national chief of Assembly of First Nations," CBC News (8 July 2021), online: CBC News <https://www.cbc.ca/news/indigenous/roseanne-archibald-afn-chief-election-1.6093144>.

5 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

such relationships, arguing that these initiatives, not the Crown's duty to consult and accommodate, provide a more just approach to planning.

2. Acknowledgement

Reciprocal, respectful relationships with First Nations and all Indigenous Peoples must be at the core of local government decisions in relation to planning. Many scholars have acknowledged the limitations of planning law and practice, including the lack of acknowledgment of Indigenous worldviews and treaty knowledge, the lack of room that is made for differing conceptions of property, and the myopic scope of planning law, which centres on prescribed measures for land use as opposed to a broader conception of planning that includes multi-generational thinking.[6] I acknowledge, too, these and other limitations in my legal education, and personal and professional experiences. I am a non-Indigenous person with a mix of European heritages who grew up in Indigenous communities in Canada, including in Churchill, Manitoba, and Iqaluit, Nunavut. I have deep roots in and have benefited enormously from the cultural and institutional foundations of this settler nation, in ways that I continue to learn and recognize. My focus here is on the intersection of law, planning, and Indigenous rights. I see it as my responsibility, but also a privilege and benefit, to understand the Indigenous context of the places I call home, including an "awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behavior."[7]

As Jeff Hewitt writes, "I reassert my hope that the practice of land acknowledgment continues and expands into more spaces. I also mean that I hope the practice continues with new versions rooted in honour (not obligation or avoidance), and openly question how the institutions (as well as readers) performing the acknowledgment find themselves on that land."[8] This article was initially drafted in the traditional and ancestral lands of the Mississaugas, Haudenosaunee Confederacy, and the Huron Wendat and Petun Nations, and subject to the Dish With One Spoon Wampum Belt Covenant, a treaty agreement between the Iroquois Confederacy and the Ojibwe and allied nations

6 See e.g. Heather Dorries, *Rejecting the "False Choice": Foregrounding Indigenous Sovereignty in Planning Theory and Practice* (PhD Thesis, Department of Geography, University of Toronto, 2012) [unpublished], and Janice Barry & Libby Porter, "Indigenous Recognition in State-Based Planning Systems: Understanding Textual Mediation in the Contact Zone" (2011) 11:2 Planning Theory 170.

7 Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles of Truth and Reconciliation,* (2015) at 113.

8 Jeffery G Hewitt, "Land Acknowledgment, Scripting and Julius Caesar" (2019) 88:2 SCLR: Osgoode's Annual Constitutional Cases Conference 27 at 39.

to peaceably share and care for the resources around the Great Lakes.[9] Later, settler communities called this place Toronto, and over time the city found its place within a province within a federation, with the presence of multiple jurisdictions that continue to apply today.[10] The article was completed in a place known as Vancouver, the traditional, ancestral, and unceded territories of the xʷməθkʷəy̓əm (Musqueam), Skxwú7mesh (Squamish), and səlilwətaɬ (Tsleil Waututh) peoples. Colonial laws and jurisdictions have long tried to erase Indigenous presence, laws, and claims, including the locations where you are reading from. At this particular nexus of time and space, when the duty to consult remains in flux at the local level, this article asks what this colonial reality means in considering legal obligations as municipalities move forward in their relationships with First Nations and Indigenous Peoples.

3. Canadian Governments Have a Duty to Consult and Accommodate

Aboriginal and Treaty rights of Indigenous Peoples are recognized and affirmed under section 35(1) of the *Constitution Act, 1982* and have been given additional context through the courts.[11] The Canadian Constitution recognizes and affirms Aboriginal rights, yet barriers to the meaningful exercise of those rights remain a pressing access to justice issue.[12] Canada's history is replete with examples of what then-Chief Justice Beverley McLachlin of the Supreme Court of Canada (SCC) called the national government's attempted "cultural genocide" towards Indigenous Peoples through the creation of reserves and residential schools, as well as by starvation and disease.[13] The federal govern-

9 For more on pre-Confederation agreements amongst First Nations and the Crown, see Michel Morin, «Manger avec la même micoine dans la même gamelle : à propos des traités conclus avec les Amérindiens au Québec, 1665-1760» (2003) 33:1 RGD 93 and Michel Morin, «La dimension juridique des relations entre Samuel de Champlain et les Autochtones de la Nouvelle-France» (2004) 38:2 RJT 389.

10 The Indigenous name "Tkaronto" is increasingly being used to refer to Toronto, and according to Indigenous languages scholar Dr John Steckley, initially comes from the Mohawk name for what is commonly known as the Atherley Narrows, between Lakes Couchiching and Simcoe, where 4000 years ago a fish weir was built. Subsequently, the French mispronounced it as *Toronto* and then used that name for a training camp at the mouth of the Humber River (TEDx Talks, "TEDexHumber College - Dr. John Steckley: What if Aboriginal Languages Mattered?" (19 February 2012), online (video): *YouTube* <www.youtube.com/watch?v=Q50ZJWc1uyE> [perma.cc/9U4N-Q7W5]).

11 *Haida, supra* note 3.

12 Fraser McLeod et al, "Finding Common Ground: A Critical Review of Land Use and Resource Management Policies in Ontario, Canada and their Intersection with First Nations" (2015) 6:1 Intl Indigenous Policy J 1; Clara MacCallum Fraser & Leela Viswanathan, "The Crown Duty to Consult and Ontario Municipal-First Nations Relations: Lessons Learned from the Red Hill Valley Parkway Project" (2013) 22:1 Can J of Urban Research 1.

13 Rt Hon Beverley McLachlin, "Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance", Remark, (2015), online (pdf): <www.aptn.ca/news/wp-content/uploads/sites/4/2015/05/

ment could simply refuse to engage in discussions with Indigenous communities over treaty violations and Indigenous claims, mandating legal action to bring the federal government to the negotiating table.[14]

In the *Delgamuukw* case, for the first time, the SCC acknowledged, critically, Canada's decades-long refusal to engage in conversations regarding land claims.[15] *Delgamuukw* represented a critical shift in the Canadian legal landscape. As Paul Tennant wrote, "[t]he ruling is certainly a victory for [A]boriginal peoples. It validates what British Columbia [Indigenous] leaders have believed and claimed ever since colonial settlement began. It recognizes that [A]boriginal title exists, defines it as a right to land, and places it within the guarantee provided by section 35 of the *Constitution Act, 1982*."[16] Following the decision, in exploring the impact on settler-Indigenous legal relationships, Tennant argued that diplomacy must be "the guiding principle" in relationships amongst First Nations and municipalities, including mutual respect for protocols and a commitment to relationship-building.[17]

Seven years later, in the 2004 *Haida* case, the SCC relied for the first time on the principle of "honour of the Crown" to argue that the federal government had a legal obligation to consult and, where necessary, accommodate Indigenous communities when proposed actions could negatively affect as yet unproven Indigenous rights.[18] The honour of the Crown and the duty to consult were consequential legal developments that expanded the federal government's responsibilities towards Indigenous communities where, at the time, the concept of a fiduciary duty did not apply — for example, where no treaties had been negotiated or where Aboriginal rights and title were claimed, but not yet established.[19] While Crown conduct need not have an immediate impact on Indigenous lands and resources, the conduct must have the potential to adversely impact lands and resources.[20] The Indigenous nation must prove a

May-28-2015-Global-Centre-for-Plualism-2.pdf> [perma.cc/78M6-SQT2]. See also Rhoda Howard-Hassmann, "Cultural Genocide of Canada's Aboriginal People" (13 July 2015), online: *Centre for International Governance Innovation* <www.cigionline.org/articles/cultural-genocide-canadas-aboriginal-people> [perma.cc/7A52-8C5Y].

14 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].

15 *Ibid.*

16 Paul Tennant, "Delgamuukw and Diplomacy: First Nations and Municipalities in British Columbia" in Owen Lippert, ed, *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision*, (Vancouver: Fraser Institute, 2000) 143 at 143.

17 *Ibid* at 146.

18 Lindsay Galbraith, "Making Space For Reconciliation in the Planning System" (2014) 15:4 Planning Theory & Practice 453.

19 *Haida*, *supra* note 3 at paras 11, 18, 27.

20 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council,* 2010 SCC 43 at paras 32, 44 [*Rio Tinto*].

causal relationship between the proposed conduct and a potential adverse impact on the claim.[21] The adverse impact must be "appreciable," and must relate to "the future exercise of the right itself."[22]

Over time, the SCC would decide that the Crown's duty to consult varied from shallow to deep depending on the nature of rights and the possible impact on the relevant Indigenous community.[23] The Supreme Court held in *Haida* that a weak claim to title, minor infringement, or limited Aboriginal right will mean that the Crown duty may be limited to giving notice, disclosing information, and discussing any issues raised in response to the notice.[24] In *Saugeen First Nation v Ontario (MNRF)*, the Ontario Superior Court held that the duty to consult jurisprudence is developing five positions on the spectrum: low, low-middle, middle, middle-high, and high, although these are not tight compartments.[25] Indigenous claimants who have a strong *prima facie* claim or a high degree of infringement will be owed "deep consultation, aimed at finding a satisfactory interim solution."[26] Courts also decided that procedural requirements were owed, like giving time for responses and making information available in Indigenous languages.[27] At minimum, the duty will require the Crown to "give notice, disclose information, and discuss any issues raised in response to the notice."[28]

The legal limits of the duty to consult and accommodate, which is a judicial doctrine, continue to evolve. Some scholars suggest that the duty to consult allows for the exercise of Indigenous sovereignty within Canadian governance structures,[29] thus acting "as a limit on Crown sovereignty and Crown action."[30] However, the fine details matter when it comes to the exercise of the duty to consult, with continued evolution on who owes a duty and, if so, how and where. For example, the Court applied the honour of the Crown and, hence, the duty to consult and accommodate, to provincial governments and therefore to natural resource companies licensed by provinces.[31] This decision

21 *Ibid* at para 45.

22 *Ibid* at para 46.

23 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 44.

24 *Haida*, *supra* note 3 at para 43.

25 *Saugeen First Nation v Ontario (MNRF)*, 2017 ONSC 3456 at para 139 [*Saugeen*].

26 *Haida*, *supra* note 3 at paras 43-44.

27 *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*].

28 *Haida*, *supra* note 3 at para 43.

29 Richard Stacey, "Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit?" (2018) 68 UTLJ 405 at 417. See also Alejandro Gonzalez, "The Evolution of the Duty to Consult" (2020) 10:1 Western J of Leg Studies 1 at 11 [Gonzalez].

30 Gonzalez, *supra* note 29 at 11.

31 *Haida*, *supra* note 3 at paras 10, 47; *Saugeen, supra* note 25 at para 16.

de facto extended the duty to planning: if the federal government were still the only level of government to owe a duty to Indigenous Peoples, then planning law — a provincial issue - would be quite outside the purview of the duty to consult and accommodate. In addition, in 2017, the SCC affirmed that even though federal and provincial governments are responsible for upholding the honour of the Crown, administrative agencies such as the National Energy Board are able to trigger and discharge the Crown's duty to consult.[32] This continued judicial evolution matters as government actions are assessed on the basis of fact-specific events that relate to particular laws on a case-by-case basis that must be considered individually and contextually.[33] Lorne Sossin notes that the fact-specific and contextual nature of the inquiry makes it difficult to identify consistent principles regarding when the duty to consult has been fulfilled.[34] The duty is therefore subject to assessment based on individual fact patterns, with courts slowly determining how far the duty extends, rather than clear and proactive commitments to relationship-building from settler governments.

4. Uncertainty Over a Municipal Duty to Consult

Under section 92 of the *Constitution Act*, provincial governments are responsible for "municipal institutions" and "matters of a local or private nature," which include the development of planning policies. As a result of this division of powers, in the SCC's duty to consult jurisprudence, provinces (but not municipalities) have been recognized alongside the federal government as holding a legal duty.[35] Municipalities, by contrast, have been considered to be administrative bodies rather than governments.[36] On this front, Jean Leclair observes that centring the federal Crown as "the sole legitimate interlocutor for Indigenous Peoples … delegitimizes all discussions with their closest governmental neighbours, i.e. the municipalities."[37] However, any constitutional changes to municipal authority will need to consider the effects of such changes

32 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc,* 2017 SCC 41 [*Chippewas*].

33 *Haida*, *supra* note 3 at para 45; *Clyde River, supra* note 27 at para 20. See also *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991 [*Squamish*] at para 35; *Saugeen, supra* note 25 at para 14.

34 Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23:1 Can J Admin L & Prac 93 at 102.

35 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48. See also See also *Squamish, supra* note 33.

36 Alexandra Flynn, "Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019) 56:2 Osgoode Hall LJ 271.

37 Jean Leclair, "Envisaging Canada in a Disenchanted World: Reflections on Federalism, Nationalism, and Distinctive Indigenous Identity" (2016) 25:1 Const Forum Const 1 at 23.

on First Nations — especially on particular Aboriginal and Treaty rights under section 35 of the Constitution.[38]

The Crown is understood by the courts to be the federal and provincial governments, and it holds a non-delegable duty to consult and accommodate.[39] The role of municipalities in applying the duty to consult jurisprudence in the sphere of planning law has been only minimally clarified by either courts or legislators. In *Neskonlith Indian Band v Salmon Arm (City)*, the BC Court of Appeal held that municipalities have no independent constitutional duty to consult First Nations whose treaty and other interests may be affected by municipal decision-making.[40] This case arose when the City of Salmon Arm allowed a permit for development to be issued in a flood plain area located right beside the reserve lands of the Neskonlith. The Court held that Salmon Arm did not owe a duty to consult the First Nation on the basis that municipalities do not have the capacity to properly consult, stating,

> I consider that the "push-down" of the Crown's duty to consult, from the Crown to local governments, such that consultation and accommodation would be thrashed out in the context of the mundane decisions regarding licenses, permits, zoning restrictions and local bylaws, would be completely impractical … Daily life would be seriously bogged down if consultation — including the required "strength of claim" assessment — became necessary whenever a right or interest of a First Nation "might be" affected. In the end, I doubt that it would be in the interests of First Nations, the Crown or the ultimate goal of reconciliation for the duty to consult to be ground down into such small particles, obscuring the larger "upstream" objectives described in *Haida*.[41]

Few other cases have considered the possible scope of a municipal duty to consult,[42] but two other decisions made by the SCC in 2017 add further ambiguity to the municipal role. The Court had previously decided that the procedural aspects of the duty could be delegated to third parties.[43] In *Clyde River*, the SCC held that the Crown may rely on administrative bodies (in these cases, the National Energy Board) to satisfy the duty to consult, noting that the Crown must supplement consultation processes where necessary to ensure that

38 Alexandra Flynn, "With Great(er) Power Comes Great(er) Responsibility: Indigenous Rights and Municipal Autonomy" (2021) 34:1 J L & Soc Pol'y 111.

39 *Haida*, *supra* note 3.

40 Shin Imai & Ashley Stacey, "Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on Neskonlith Indian Band v Salmon Arm (City)" (2014) 47:1 UBC L Rev 293.

41 *Neskonlith Indian Band v Salmon Arm (City),* 2012 BCCA 379 at para 72.

42 See e.g. *Morgan v Sun Peaks Resort Corporation*, 2013 BCSC 1668; *Squamish*, *supra* note 35; *Cardinal v Windmill Green Fund LPV*, 2016 ONSC 3456 [*Cardinal*].

43 *Haida Nation*, *supra* note 3.

the duty to consult is adequate.[44] An administrative agency may also assess the adequacy of its consultation process, unless the authority to do so is explicitly removed by statute.[45] In such cases, the body is understood as representing the Crown with respect to consultation. Some academics have argued that these decisions establish that a municipality can represent the Crown and that the province may rely on the administration of municipal planning processes in discharging its duty.[46]

While the Supreme Court has yet to consider the issue directly, a number of legal academics have analyzed whether or not municipalities ought to or do in fact hold that duty. Kaitlin Ritchie suggests that, were municipalities to take on that duty, it would water down the nation-to-nation relationship, thereby undermining the treaty and other relationships established between the Crown and Indigenous nations.[47] Felix Hoehn and Michael Stevens argue that, given the evolution of municipal autonomy, and given the fact that third parties have been put into positions where they are in effect an arm of the Crown, municipalities do in fact hold the duty to consult and accommodate. Angela D'Elia Decembrini and Shin Imai advance that local governments must consult with Indigenous Peoples impacted by development decisions and, if they do not, the Province must step in.[48] In practical terms they state that, "the municipality cannot proceed with a project until the duty to consult has been fulfilled."[49] They observe that municipalities in some provinces (e.g. Ontario and British Columbia) are expected to consult, that these provinces rely on municipalities to do so, and that municipalities and First Nations have long held agreements with one another.[50]

Decembrini and Imai's analysis points to the fact that provinces have a duty to consult and accommodate Indigenous Peoples. In relation to planning laws, specific legislation is enacted at the provincial level, but power is generally delegated to local and regional municipalities with differing degrees of oversight. Despite the fact that municipalities have delegated planning responsibil-

44 *Clyde River, supra* note 26.

45 *Ibid.*

46 Felix Hoehn & Michael Stevens, "Local Governments and the Crown's Duty to Consult" (2018) 55:4 Alta L Rev 971; Imai & Stacey, *supra* note 40.

47 Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 46:2 UBC L Rev 397.

48 Angela D'Elia Decembrini & Shin Imai, "Supreme Court of Canada Cases Strengthen Argument for Municipal Obligation to Discharge Duty to Consult: Time to Put Neskonlith to Rest" (2019) 56:3 Alta L Rev 935.

49 *Ibid* at 945.

50 *Ibid*; Imai & Stacey, *supra* note 40.

ity, few provinces have clarified how local governments are meant to conduct consultations with First Nations and Indigenous communities.[51] The Province of Ontario sets out the specific rules that define the obligations of municipalities, the purposes of guiding planning documents, such as official plans, and the requirements for public consultation.[52] While the purported position of Ontario's Ministry of Municipal Affairs and Housing is that "municipalities have a duty to consult in some circumstances,"[53] little information is provided to these local governments regarding the scope of the duty, the roles of municipal, regional, and provincial bodies, and how local governments should engage with Indigenous communities.

In 2020, the Province of Ontario released an updated version of the Provincial Policy Statement (PPS), a document that addresses land-use planning policies and decision-making abilities.[54] A PPS is a policy akin to a recommendation or guideline, having considerable weight in local planning policies as well as particular decisions. The PPS states that it "shall be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*."[55] In addition, PPS section 1.2.2 states that "[p]lanning authorities shall engage with Indigenous communities and coordinate on land use planning matters."[56] Section 2.6.5 more specifically addresses heritage by stating: "Planning authorities shall engage with Indigenous communities and consider their interests when identifying, protecting and managing cultural heritage and archaeological resources."[57] These bromides do not provide much guidance, nor do they provide a regulatory scheme to guide implementation. Since the PPS only includes vague generalities about planning with First Nations, it is not surprising that the Province has provided limited guidance or training and few resources to instruct municipal planners in how to respectfully engage Indigenous governments and peoples. Moreover, the PPS does not explicitly state that municipalities have a procedural duty to consult and accommodate. There are no oversight mechanisms for ensuring that the PPS is used, no appeal processes if it is not used, and no information on how municipalities have interpreted provisions.

51 Dorries, *supra* note 5; Leela Viswanathan et al, "Are We There Yet? Making Inroads to Decolonize Planning Knowledge and Practices in Southern Ontario" (2013) 53:3 Plan Canada 20; David J Sinson & P Leigh Whyte, "Update on the Duty to Consult" (2016) 31:1 Ontario Planning J 22.

52 *Planning Act*, RSO 1990, c P.13.

53 "Municipal-Aboriginal Relationships: Case Studies" (29 June 2018), online: *Government of Ontario* <www.mah.gov.on.ca/Page6054.aspx> [perma.cc/8L56-RE9J].

54 *Ontario Provincial Policy Statement*, OC 229/2020 (*Planning Act*) [PPS].

55 *Ibid* at s 4.3.

56 *Ibid*, s 1.2.2.

57 *Ibid*, s 2.6.5.

In addition, the legal and procedural aspects of the duty to consult are distinguished within the jurisprudence. The legal duty rests with the Crown, which may delegate procedural responsibilities to other parties, determine the appropriate structure of the consultation process, and decide on the manner in which it will fulfill its duty to consult.[58] Canadian provinces, including Ontario, are not always clear on when procedural requirements of the duty are delegated to municipalities and, if so, what steps local governments are expected to take to satisfy obligations. For example, Saskatchewan policy suggests a legal duty in some circumstances and a procedural duty in others, with little guidance in corresponding legislation.[59] The policy reads:

> Municipalities are established by provincial legislation and exercise powers delegated by the Provincial Government. Municipalities may have a duty to consult whenever they independently exercise their legal authority in a way that might adversely impact the exercise of Treaty and Aboriginal rights and/or traditional uses on unoccupied Crown land or other lands to which First Nations and Métis have a right of access. In cases where the municipality is the proponent of a development, the Government can assign procedural aspects of the consultation to the municipality, as it may with any other proponent.[60]

The lack of provincial direction is meaningful. According to the courts, where there is a duty, "it must be approached systemically and comprehensively."[61] Planning legislation and provincial planning statements in general set out consultation obligations, including obligations relating to notice, public meetings, dissemination of required materials, and the provision of opportunities for public comment.[62] The Crown may rely on regulatory bodies and tribunals to partially or completely fulfill the duty to consult, but the Crown remains ultimately responsible for ensuring that the duty is fulfilled.[63] Even where a regulatory body, such as the National Energy Board, has been found to have the necessary procedural and remedial powers to consult and accommodate Indigenous

58 *Gitxaala Nation v Canada*, 2016 FCA 187 at para 203. See also *Tsleil-Waututh Nation v Canada (AG)*, 2018 FCA 153 at para 516 [*Tsleil-Waututh*]; *Cold Lake First Nations v Alberta,* 2013 ABCA 443 at para 39.

59 Saskatchewan, "First Nation and Métis Consultation Policy Framework" (2010), online (pdf): <publications.gov.sk.ca> [perma.cc/H7DJ-XBBL] [Saskatchewan].

60 Saskatchewan, *supra* note 59 at 8. See also "Municipal Governments and the Crown's 'Duty to Consult': Towards a Process that Works for Local Communities" (10 April 2019), online (pdf): *Association of Municipalities of Ontario* <www.amo.on.ca> [perma.cc/7KN2-VM8S] at 14-15 [AMO] (Unlike Ontario, assistance and policy guidance is available to local governments in Saskatchewan in exercising the duty).

61 *Saugeen, supra* note 25 at para 20.

62 AMO, *supra* note 61 at 10.

63 *Haida*, *supra* note 3 at paras 51 and 53; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74 at para 40; *Rio Tinto, supra* note 20 at para 56; *Clyde River, supra* note 27 at paras 1 and 21.

nations, the Crown cannot delegate its ultimate responsibility to fulfill the duty, and cannot "rely unwaveringly upon the Board's findings and recommended conditions."[64] If the body in question has insufficient statutory powers to fulfill the duty, or has not provided adequate consultation and accommodation, the Crown must take additional steps to do so, either by "filling any gaps on a case-by-case basis or more systematically through legislative or regulatory amendments."[65]

It remains unclear how this jurisprudence applies to municipal decisions in areas like planning, where local governments have been delegated significant responsibility, but have been granted little guidance on how to fulfil the duty to consult. Courts are clear that, where regulatory bodies are involved in consultation, the Crown must inform implicated Indigenous groups about the nature of the process in order for Indigenous groups to meaningfully engage in consultation.[66] The Crown is expected to approach the duty systematically, and should "not simply adopt an unstructured administrative regime" to fulfill the duty.[67] In *Brantford v Montour*, the Ontario Superior Court of Justice confirmed that Ontario's municipal governments can carry out procedural aspects of the duty to consult, but that the responsibility of the process and funding remains with the province.[68]

The result of this legislative and judicial uncertainty is mixed messages from municipalities. A provincial advocacy body called the Association of Municipalities of Ontario (AMO) has released an official report stating that municipalities do not have a legal duty to consult and that procedural requirements are imprecise.[69] Some municipalities in Ontario have decided that they do have a duty to consult.[70] Indigenous communities are caught in the shuffle of the cat-and-mouse game of who must exercise the duty.

In Ontario, quasi-judicial decisions have not adequately clarified the legal landscape. The Ontario Municipal Board (OMB), which became known as the Local Planning Appeals Tribunal (LPAT) in 2017, is a quasi-judicial body

64 *Tsleil-Waututh, supra* note 58 at para 627.

65 *Clyde River, supra* note 27 at para 22. See also *Chippewas, supra* note 32 at paras 32, 44; *Tsleil-Waututh, supra* note 58 at para 517.

66 *Clyde River, supra* note 27 at para 23; *Chippewas, supra* note 32 at para 46.

67 *Saugeen, supra* note 25 at para 20. See also *Haida*, *supra* note 3 at para 51.

68 *City of Brantford v Montour et al*, 2010 ONSC 6253.

69 AMO, *supra* note 61.

70 "First Nations, Indigenous & Aboriginal Consultation: Town of Midland Official Plan Review Interim Report" (16 December 2016), online (pdf): Town of Midland <www.midland.ca> [perma.cc/PV4S-P3NA] [Town of Midland].

first created in 1906 that has sweeping power to oversee the planning practices of local governments in the areas of municipal conduct and railways and, ultimately, to challenge municipal planning decisions.[71] For years, municipalities objected to the OMB — it was widely seen as a vehicle to overrule municipal planning decisions. Problematically, given the province's position as Crown, the restructuring and renaming of the OMB in 2017 did not provide robust consultation for Indigenous communities, despite the many changes that impact Indigenous communities.[72] This quasi-judicial body has made a number of decisions concerning municipal consultation of Indigenous communities, including the question of whether consultation was adequate,[73] whether the manner and form of consultation and the scope of the duty may vary,[74] and whether the duty to consult requires a separate process. On this latter point, the LPAT has determined that the consultation of Indigenous Peoples may be adequate if regular community consultations include Indigenous participants.[75] While some Indigenous communities have found success at the LPAT, overall it is an expensive, time-consuming process that is ill-suited to replace meaningful consultation.[76] If Indigenous Peoples/communities are being treated as if they were garden variety neighbours — whose voices are respectfully heard by the LPAT but whose demands/suggestions most often go unheard — then that's a problem, constitutionally.

5. Problems with the Duty to Consult in the Land Use Planning Context

The legal landscape of the duty to consult and its application to municipalities is murky at best, but in any case, it is an inadequate tool in urging governments

71 While the LPAT will be housed, staffed and directed in the same way as the OMB, the legislation introduced changes that result in more deference to city council decisions. Please note that at the time of writing, the Province of Ontario released proposed legislation that suggested a return to OMB rules. This proposed bill also did not make any reference to municipal consultation with First Nations.

72 Those who object to municipal council decisions must establish a record of dissent very early in the process since the LPAT will conduct its reviews based on documentary evidence and in the absence of witnesses.

73 *Elliot Lake Development Corporation v The Serpent River First Nation*, 2011 ON OMB PL110021.

74 *Burleigh Bay Corporation v North Kawartha (Township)*, 2015 CanLII 63200 (ON LPAT).

75 *Cardinal*, *supra* note 42.

76 Nancy Kleer, Lorraine Land & Judith Rae, "Bearing and Sharing the Duty to Consult and Accommodate in the Grey Areas in Consultation: Municipalities, Crown Corporations and Agents, Commissions, and the Like,", (Report delivered at the Canadian Institute Conference in Toronto, Ontario, 24 February 2011), online (pdf): <oktlaw.com> [perma.cc/K73X-EDKR]. See also *Kimvar Enterprises Inc v Simcoe (County)*, [2007] OMBR No 842; *Re Town of Saugeen Shores Official Plan*; *Ontario (MTO) v Garden River First Nation*, 50 OMBR 44; *Ontario Heritage Act*, RSO 1990, c 0.18. On licensing, see O Reg 8/06.

to model a nation-to-nation relationship between Indigenous Peoples and the Crown. Fundamentally, the duty to consult and accommodate is particularly ill-suited to municipalities given the Indigenous populations that live within and adjacent to municipalities.

The city as we know it is rooted in Western notions of property law and governance.[77] Colonial cities are sites of displacement, often originating as Indigenous communities with their rich access to resources and mobility.[78] Systematic campaigns by colonial powers pushed Indigenous nations from urban centres, with land and rights eradicated. Indigenous boundaries do not map along municipal ones and particular localities may hold political, spiritual, and economic meaning to Indigenous communities.[79] Many First Nations were displaced in the creation of colonial cities, with the result that there may or may not be treaty relationships and Indigenous claims within and adjacent to cities.[80] About half of all Indigenous Peoples live within cities across Canada and there are a broad and diverse range of Indigenous Peoples who may or may not have connections with the adjacent First Nations.[81] Moreover, First Nations have treaty and land interests such as reserves, urban reserves, and fee simple title at the urban scale, both within and adjacent to municipalities.[82] In some cities, Indigenous-led organizations have statutory mandates in the areas, such as in child welfare and education.[83] As such, there is no uniform reality for Indigenous-municipal relationships across Canada as each legal space is unique.

---

77 Sarem Nejad et al, "'This is an Indigenous city; why don't we see it?' Indigenous urbanism and spatial production in Winnipeg" (2019) 63:3 The Canadian Geographer 413.

78 Victoria Jane Freeman, '*Toronto Has No History!' Indigeneity, Settler Colonialism and Historical Memory in Canada's Largest City* (PhD Thesis, University of Toronto, 2010) [unpublished].

79 S Yvonne Prusack, Ryan Walker & Robert Innes, "Toward Indigenous Planning? First Nation Community Planning in Saskatchewan, Canada" (2016) 36:4 J of Planning Education and Research 440.

80 Dorries, *supra* note 5; Christopher Alcantara & Jen Nelles, *A Quiet Evolution : The Emergence of Indigenous-Local Intergovernmental Partnerships in Canada* (Toronto: University of Toronto Press, 2016).

81 "Report of the Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship" (1996), online (pdf): <data2.archives.ca> [perma.cc/AM8B-UQJ6] at 263 [RCAP]. The RCAP defines 'urban community of interest' as a collectivity that emerges in an urban setting, includes people of diverse Aboriginal origins, and 'creates itself' through voluntary association.

82 Mary Jane Norris, Stewart Clatworthy & Evelyn Peters, "The Urbanization of Aboriginal Populations in Canada: A Half Century in Review" in Evelyn Peters & Christopher Anderson, eds, *Indigenous in the City: Contemporary Identities and Cultural Innovation* (Vancouver: UBC Press, 2013) 29 [*Indigenous in the City*].

83 Yale D Belanger, "Breaching Reserve Boundaries: Canada v Misquadis and the Legal Creation of the Urban Aboriginal Community," in Evelyn Peters & Chris Anderson, eds, *Indigenous in the City: Contemporary Identities and Cultural Innovation* (Vancouver: UBC Press, 2013) 69.

The duty to consult's insistence on mapping the strength of a claim along a spectrum of weak to strong and on then overlaying the strength of the duty owed is challenging in the context of a municipality. For a strong claim to apply under the duty to consult, ongoing use or occupation by Indigenous Peoples must be established, which ignores situations where First Nations were forcibly removed decades or centuries ago and municipal planning processes were introduced that led to private ownership, creation of parks, and other initiatives.[84] The duty to consult also assumes a singular First Nation that can make decisions on behalf of a particular group of people.[85] The duty may not consider urban Indigenous populations as self-organized, self-determining groups that have political communities distinct from on-reserve Indigenous governments.[86] In short, the duty to consult and accommodate does not account for the urban Indigenous reality.

Outside of the municipal context, there are numerous criticisms of the duty to consult that lay question to its suitability as a framework to guide Indigenous-settler relations, even though it has been beneficial for First Nations in some respects.[87] First, the courts have stated that the goal of the duty to consult and accommodate is to achieve "reconciliation."[88] However this term has not been given a definable legal meaning.[89] What this term means, and to whom, is only vaguely explored and, to many Indigenous Peoples, leaves out an acknowledgement of the colonialism that underpins our legal system. Mariana Valverde and Adriel Weaver write that reconciliation is "purged of its potential to challenge colonial violence" and is instead "a statement whose logical corollary, apparently, is that the Crown must act decently not because of international human rights norms but because of its internal, self-imposed honour."[90] Similarly, Robert Hamilton and Joshua Nichols observe that if the Supreme Court acknowledged that the relationship between the parties is in-

84 "Indian Act Amendment" Canada, Parliament, *House of Commons Debate*, 11th Parliament, 3rd Session (10 April 1911) (Sir Wildred Laurier) at 7020. <https://parl.canadiana.ca/view/oop.debates_HOC1103_04/545?r=0&s=1>. The amendment can be found here: <http://kopiwadan.ca/wp-content/uploads/2017/01/1911-An-Act-to-amend-the-Indian-Act.pdf>.

85 Belanger, *supra* note 85.

86 *Ibid.*

87 See e.g. Dwight G Newman, *Revising the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014); Rachel Ariss, Clara MacCallum Fraser & Diba Nazneen Somani, "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?" (2017) 13:1 McGill J of Sustainable Development L 1; Felix Hoehn & Michael Stevens, "Local Governments and the Crown's Duty to Consult" (2018) 55:4 Alta L Rev 971.

88 *Chippewas, supra* note 32.

89 *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289.

90 Mariana Valverde & Adriel Weaver, "'The Crown Wears Many Hats': Canadian Aboriginal Law and the Black-boxing of Empire" in Kyle McGee, ed, *Latour and the Passage of Law* (Edinburgh: Edinburgh University Press, 2015) 93 at 108.

deed nation-to-nation, the appropriate doctrine would no longer be a duty to consult and accommodate.[91]

Second, the duty to consult does not apply to the law-making process, from the development of legislation to its enactment.[92] In *Mikisew Cree*, decided in 2018, the SCC ruled in a fractured decision that the duty to consult and accommodate does not require governments to consult with Indigenous communities during the law-making process.[93] The duty as it is understood allows for Crown legislation to be instituted without any engagement with Indigenous Peoples, as evidenced by the legislative changes that resulted in LPAT and that point to an absence of consideration of Indigenous Peoples. Ontario's recent reforms to planning adjudication could have been an opportunity to meaningfully and respectfully engage with Indigenous communities and to clarify the role of municipalities. This oversight exemplifies John Borrows' recognition that "First Nations must comply with provincial laws which they have no real role in crafting or administering."[94] It is meaningful that New Zealand's Supreme Court rejected this approach, holding that any challenges involving identifiable Māori rights are justiciable before courts, including those that involve legislative development.[95]

Interestingly, the majority in *Mikisew Cree* carved out an important exception for subordinate legislation, regulations, and rules, stating that such conduct is "clearly executive rather than parliamentary."[96] To date, there is no case law on what this exception means in relation to municipalities and their engagement with First Nations and Indigenous Peoples. However, in his analysis of this exception, Nigel Bankes, cited in *Mikisew Cree*, observed that the lack of applicability of the duty to consult to law-making "does *not* speak more generally and inclusively to that category of decisions known as delegated legislative decisions, i.e. rule-making whether in the form of regulations, rules, adoption of land use plans etc."[97] As Bankes states, "[s]uch decisions cannot benefit from arguments

91 Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729.

92 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 50-51 [*Mikisew Cree*].

93 *Ibid.*

94 John Borrows, "Canada's Colonial Constitution" in John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 17.

95 *Ngāti Whātua Ōrakei Trust v Attorney General* [2018] NZSC 84.

96 *Mikisew Cree, supra* note 94 at para 51.

97 Nigel Bankes, "The Duty to Consult and the Legislative Process: But What About Reconciliation?" (21 December 2016) at 5, online (pdf): *ABlawg: The University of Calgary Faculty of Law Blog* <ablawg.ca> [perma.cc/CGK7-WD4W] [emphasis in original].

of parliamentary privilege and such decisions are in principle subject to judicial review in the ordinary course."[98] Since municipalities are considered to be administrative bodies under Canadian law, provinces may delegate a procedural requirement to consult in respect of their bylaws or land land use plans, while retaining, as Crown, the onus of discharging the legal duty to consult. Any recognition of municipalities as having a legal duty to consult would need to answer whether bylaws would be considered regulations or rules, or legislation.

Third, the duty to consult does not acknowledge the existence and operation of Indigenous laws or planning approaches. Borrows distinguishes between Indigenous law, which consists of legal orders that are rooted in Indigenous societies, and Aboriginal law, which is "a body of law made by the courts and legislatures that largely deals with the unique constitutional rights of Aboriginal peoples and the relationship between Aboriginal peoples and the Crown" and that is largely found in colonial instruments. Indigenous law may include relationships to land, stories, customs, deliberation processes, and codes of conduct, although "[c]are must be taken not to oversimplify Indigenous societies by presenting each group's laws as completely isolated and self-contained. Law, like culture, is not frozen."[99] Canadian law, as expressed through legislation, reinforces the colonial oppression of Indigenous Peoples by omitting Indigenous law and cultural frameworks.[100] Indigenous approaches fundamentally differ from the existing top-down practices of consultation and accommodation.[101] As Marie Battiste and James Youngblood Henderson explain, Indigenous law challenges the construction of knowledge that is oversimplified, is imposed on a broad range of peoples, or is codified into a definition.[102] As Borrows states, processes must incorporate the principles of co-existence, co-operation, and respect, rather than competition or dominance.[103] Instead, the duty to consult

98 *Ibid.*

99 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 59.

100 Christie, *supra* note 2; Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough, ON: Broadview Press, 2005); Napoleon, *supra* note 2; PA Monture-Okanee & ME Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) 26 UBC L Rev 239.

101 Rosie Simms et al, "Navigating the Tensions in Collaborative Watershed Governance: Water Governance and Indigenous Communities in British Columbia, Canada" (2016) 73 Geoforum 6.

102 Marie Battiste & James (Sa'ke'j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich, 2000); John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:3 McGill LJ 629.

103 John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47:4 UTLJ 417. See also Deborah McGregor, "Coming Full Circle: Indigenous Knowledge, the Environment, and Our Future" (2004) 28:3/4 American Indian Quarterly 385; Leanne R Simpson, "Anticolonial Strategies for the Recovery and Maintenance of Indigenous Knowledge" (2004) 28:3/4 American Indian Quarterly 373; Deborah McGregor, "Linking Tradition Knowledge and Environmental Practice In Ontario" (2009) 43:3 J of Can Studies 69.

is exercised as top-down, with itemized checklists as opposed to engagement with Indigenous laws and planning approaches.

Fourth, the duty to consult does not incorporate the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.[104] *UNDRIP* enshrines the principle of "free, prior and informed consent,"[105] and requires states to establish and implement "a fair, independent, impartial, open and transparent process … to recognize and adjudicate the rights of Indigenous Peoples pertaining to their lands, territories and resources."[106] Former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya questioned the notion that consultation in respect of only those lands recognized as Indigenous under state law is "misplaced, since commensurate with the right to self-determination and democratic principles, and because of the typically vulnerable conditions of Indigenous Peoples, the duty to consult with them arises whenever their particular interests are at stake, even when those interests do not correspond to a recognized right to land or other legal entitlement."[107] Michael Coyle argues that attention to the dialogic framework within which Indigenous concerns are addressed during consultations, and particularly to Indigenous Peoples' participation in developing that framework, is key to managing conflicts effectively and to reconciling current Canadian law and practice with the principles of the UN Declaration.[108]

UNDRIP is also meaningful more broadly. Current Canadian law on remedies for violations of Indigenous Peoples' rights is quite limited.[109] It is limited in part because, under Canadian law, the protection of Indigenous rights is limited. The ability of governments to justifiably limit these rights means that, even if a claimant successfully proves an interference with a right, it often seems as though the courts defer to the government's arguments on the need to limit the right, undermining the goal of constitutionally entrenching these rights. In contrast to domestic jurisprudence, international human rights bodies have ordered fairly robust remedies that both vindicate rights and are meant

104 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 at 15 (entered into force 13 September 2007) [*UNDRIP*].

105 *UNDRIP*, *supra* note 107 at art 19. See also Gonzalez, *supra* note 29 at 16.

106 *UNDRIP*, *supra* note 107 at art 27.

107 James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, A/HRC/12/34 (15 July 2009) at 15.

108 Michael Coyle, "From Consultation to Consent: Squaring the Circle?" (2016) 67 UNBLJ 235. See also Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in Patricia Holmes et al, eds, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Centre for International Governance Innovation, Waterloo: 2017) 63.

109 Brenda L Gunn, "Remedies for Violations of Indigenous Peoples' Human Rights" (2019) 69:1 UTLJ 150.

to deter government from engaging in activities that further violate Indigenous Peoples' rights.

Of all of the provincial governments in Canada, British Columbia is the only one that has implemented *UNDRIP*.[110] However, *UNDRIP* only applies at the provincial level, and it is unclear as yet if or how this will bind the provincial Crown in the duty to consult processes or extend to municipalities.[111] That said, as the article will now explain, many Canadian local governments have endorsed *UNDRIP*, suggesting an alternative framework for relationships with Indigenous Peoples and communities at the municipal level.

6. Indigenous-Municipal Relationships as the Foundation of Local Planning Frameworks

Much of the discussion around Indigenous — municipal relations since the Supreme Court of Canada decision, *Haida*, has revolved around the legal concept of consultation — specifically, the duty of the Crown to consult and accommodate Indigenous communities when a decision or action will have a real or potential impact on that community's Aboriginal or treaty rights.[112]

Before *Haida* was decided, the 1996 Report of the Royal Commission on Aboriginal Peoples (RCAP) acknowledged the significant number of Indigenous residents and agencies in large cities, as well as the emergence of "community of interest" governments representing Indigenous Peoples within urban areas. The RCAP defined an "urban community of interest" as a collectivity that emerges in an urban setting, and that "creates itself" through voluntary association of people of diverse Indigenous origins. RCAP envisaged urban government reform that takes better account of Indigenous perspectives and interests through means such as ensuring Indigenous representation on decision-making bodies, establishing Indigenous Affairs Committees, and ensuring co-management of urban initiatives.[113] RCAP reported that municipal agencies rely on Indigenous agencies focused on social services and housing to deliver services to Indigenous Peoples, although these agencies are often

110 "BC Declaration on the Rights of Indigenous Peoples Act," online: *British Columbia* <www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples>.

111 Gonzalez, *supra* note 29 at 16.

112 Borrows, *supra* note 97.

113 "Report of the Royal Commission on Aboriginal Peoples, Volume 4: Perspectives and Realities" (1996), online (pdf): <data2.archives.ca> [perma.cc/AM8B-UQJ6] at 439-40.

underfunded.[114] In some cities, Indigenous-led organizations have statutory mandates in some areas, such as child welfare and education.[115] These entities are delivering services and are not formal governments, although courts have recognized their importance in representing the interests of urban Indigenous Peoples.[116]

Municipalities across Canada have introduced governance changes, largely after 2010, such as the introduction of Indigenous affairs offices at a senior level within municipal bureaucracies; the existence of Indigenous advisory councils to offer advice on city policy and initiatives; mandatory training on Indigenous cultural competency; the endorsement or passage of *UNDRIP*; action plans to address the Calls to Action of the Truth and Reconciliation Commission (TRC); and initiatives to co-manage or include place-naming in parks. Some Canadian cities have also decided that they have a duty to consult.[117] Others have agreed to sit in ceremony to resolve the challenges of bylaws and policies that infringe on ceremonies.[118] It is unclear whether the duty to consult has led to the introduction of these initiatives or whether other forces, such as RCAP, TRC, the advocacy of Indigenous Peoples and governments, or court decisions such as *Canada v Misquadis*, prompted change.

Although not Crown governments, municipal governments in Ontario have introduced a number of measures to focus on relationship-building. The City of Toronto, for example, has increasingly included Indigenous perspectives in its governance model and started to build relationships with Indigenous communities.[119] In 2010, the City affirmed recognition and respect for the unique status and cultural diversity among the Aboriginal communities of Toronto, including recognition of their inherent rights under the Constitution.[120] In 2014, Toronto City Council endorsed the 94 Calls to Action from the TRC Report and requested the development by staff of concrete actions to fully implement the Calls to Action that explicitly recognize the role of municipal

114 Joanne Heritz, "Urban Aboriginal Peoples in Canada: Beyond Statistics," (CPSA Conference delivered in Montreal, 1-3 June 2010), online (pdf): <www.cpsa-acsp.ca> [perma.cc/9T24-XX32].

115 Belanger, *supra* note 84.

116 *Ibid.*

117 See e.g. Town of Midland, *supra* note 72.

118 Doug Anderson & Alexandra Flynn, "Rethinking 'Duty': The City of Toronto, a Stretch of the Humber River, and Indigenous-Municipal Relationships" (2020) 58:1 Alta L Rev 107.

119 City Council, *Development of an Urban Aboriginal Strategy for Toronto* (5 August 2009), online: <app.toronto.ca> [perma.cc/V6DM-J3WW].

120 City Council, *Draft City of Toronto Statement of Commitment to Aboriginal Communities in Toronto: Building Strong Relationships, Achieving Equitable Outcomes* (27 May 2010), online: <app.toronto.ca> [perma.cc/4EC6-QERE].

governments.[121] These measures included the adoption of cultural competency training for the Toronto civil service, a 10-year capital project to incorporate Indigenous place-making in Toronto parks, and a roadmap and report card regarding the implementation of plaques to commemorate Indigenous places. In addition, City Council has adopted an ongoing ceremony at its meetings and has approved a public campaign to educate residents of the Year of Truth and Reconciliation Proclamation.[122]

While challenges remain and a respectful, reciprocal legal relationship is far from having been created, the City of Toronto has gone beyond provincial requirements in an important way by adopting *UNDRIP* in 2013.[123] Adoption of *UNDRIP* is widely seen by Indigenous activists, scholars, and lawyers as a best practice, although it has not yet been approved by the Province of Ontario. Toronto's actions on this front are noteworthy for two reasons. First, *UNDRIP* goes well beyond the duty to consult in its recognition of Indigenous rights, most importantly in relation to the requirement of Free, Prior, and Informed Consent (FPIC), which means that Indigenous Peoples have the right to say no to a project proposal. While the City of Toronto has not specifically set out how and when FPIC applies to project approval, the adoption of *UNDRIP* remains an important step in signaling the City's desire to build respectful reciprocal relationships with Indigenous communities. Second, following the release of the TRC report, the City of Toronto acknowledged Article 11 of *UNDRIP*,[124] noting its "staff's legal duty to consult," particularly in relation to environmental assessments and heritage.[125] With this acknowledgement, the City has taken an important step by imposing an obligation on itself that arguably only the Province or a court could otherwise impose.

---

121 See e.g. Toronto City Manager, *Fulfilling Calls to Action from Truth and Reconciliation Commission Report* (1 April 2016), online (pdf): <www.toronto.ca> [perma.cc/64JP-3XLH] [Fulfilling Calls]; City Council, *Implementing Indigenous Cultural Competency Training in the Toronto Public Service* (24 May 2017), online (pdf): <www.toronto.ca> [perma.cc/NZ5T-WKDY] [City Council].

122 City Council, *Aboriginal Year of Truth and Reconciliation and Establishment of Aboriginal Office* (19 March 2014), online: <app.toronto.ca> [perma.cc./NCZ3-RLTE].

123 Fulfilling Calls, *supra* note 124.

124 *UNDRIP*, *supra* note 106. Article 11 states that: (1) Indigenous Peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature; and (2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous Peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

125 Fulfilling Calls, *supra* note 124.

In addition, Toronto, like a number of other municipalities in Ontario and elsewhere, has created an Indigenous Affairs Office meant to oversee place-based relationship building with Indigenous communities.[126] The Indigenous Affairs Office helps to guide the municipal government in its relationships with Indigenous Peoples, including urban Indigenous communities, neighbouring First Nations and Métis Nation of Ontario, and Indigenous organizations.[127] While this does not replace the need for the City's planning department to engage in its own relationship-building work with the Indigenous communities and nations that ought to be consulted on planning projects, what it does do is start to build a corporate knowledge and awareness about the important relationships that are to be cared for by the City. The City of Toronto is in the early stages of developing an awareness of the rights and governance of the Indigenous Peoples who live, work, and have connections to the space, of agreements made in order for settlers to live here, and of when and how it has previously overstepped its bounds and neglected to uphold its responsibilities.

7. Moving Forward in Indigenous-Municipal Legal Relationships

The fact that Indigenous communities and municipalities are examining how they can move forward in relationship-building beyond the duty to consult does not sidestep the role of provinces, which can constitutionally obligate, or at minimum urge, local governments in moving towards respectful, reciprocal relationships. For example, the Province of British Columbia has initiated a full review of planning processes across the province to modernize them in a manner that both ensures collaboration with Indigenous governments informed by *UNDRIP* and the Truth and Reconciliation Commission Calls to Action, and involves local governments.[128] The goal is "to ensure consistency and co-ordination between local government and provincial-First Nations-led land use planning."[129] The Government of British Columbia and the Union of British Columbia Municipalities (UBCM), which represents local governments in the province, signed a Memorandum of Understanding in 2018 that commits to

126 See e.g. the City of Toronto's Indigenous Affairs Office, online: <https://www.toronto.ca/city-government/accessibility-human-rights/indigenous-affairs-office/>.

127 See e.g. Fulfilling Calls, *supra* note 124; City Council, *supra* note 123; City Council, *Proposed Aboriginal Office for the City of Toronto* (3 November 2017), online: <app.toronto.ca> [perma.cc/KSS5-SGZS].

128 British Columbia Ministry of Forest, Lands, Natural Resource Operations and Rural Development, "Modernizing Land Use Planning in British Columbia: Working with Communities" (19 February 2020), online: <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/factsheets/mlup_working_with_communities_factsheet_mar2020.pdf>.

129 *Ibid.*

"sincere and honest engagement" and notes that local governments are "key partners in achieving true, lasting reconciliation with Indigenous Peoples."[130] Further to this objective, UBCM provides support to local governments, First Nations, and Indigenous communities seeking sustained relationship-building, including workshops that provide opportunities for local governments to respond to the Calls to Action delivered by the TRC's Report in 2013.

Unfortunately, there are few resources aimed at the development of relationships between Indigenous and municipal communities. This includes funding for joint economic development planning and the inclusion of staff and advisory boards at the municipal level to develop and track relationship-building. The foundational knowledge required to build such relationships — knowledge of Indigenous as opposed to just Aboriginal law — must be fostered within local government frameworks and is needed to prevent continued colonization.[131] In this regard, various organizations across Canada are engaging in proactive work to facilitate and support relationship-building between municipalities and Indigenous communities. The Federation of Canadian Municipalities (FCM), in partnership with the Council for the Advancement of Native Development Officers (Cando), runs the Community Economic Development Initiative (CEDI) as well as the Community Infrastructure Partnership Project (CIPP). Through multi-year partnerships, both programs enable formalized relationships between Indigenous communities, municipalities, and relevant stakeholders to be established and to flourish. In Ontario, a charitable organization called the Shared Path Consultation Initiative launched the Indigenous-Municipal Engagement Program, a pilot program to provide similar opportunities for formalized relationship-building. The Shared Path's work focuses on creating opportunities for Indigenous and non-Indigenous communities to gather in order to examine, discuss, and deliberate about current policies around land use and relationships, as well as the changing legal landscape of consultation. These efforts move beyond the duty to consult and accommodate to a framework of relationship-building.

130 "Memorandum of Understanding Between the Province of British Columbia and the Union of British Columbia Municipalities on Engagement with UBCM and Local Governments on Treaty Agreements, Non-Treaty Agreement and Indigenous Initiatives" (10 September 2018), online: *Union of BC Municipalities* <www.ubcm.ca> [perma.cc/3M3K-HXDA].

131 Madeleine Koch & Janice Barry, "Treaty Principles are Planning Principles: Learning from the Experiences of Manitoban Planning Practitioners" (2016) 56:4 Plan Canada 22.

8. Conclusion

Ontario's 2020 PPS states that municipal planning decisions "shall be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*."[132] It is unclear what that means for municipalities in this policy or in supporting legislation. The argument that the duty to consult and accommodate ought to remain with the Crown given the nature of the nation-to-nation relationship between the Crown and Indigenous nations is compelling. Yet, there is much work to be done to consider First Nations and Indigenous Peoples in municipal planning process. I suggest that the duty to consult and accommodate is an incomplete framework to guide the work that needs to be done between First Nations and local governments; conversations regarding the obligations of municipal governments should not be framed in terms of whether or not they hold a duty to consult. Instead, I urge that a deeper commitment to reciprocal, respectful relationships, not simply a duty to consult and accommodate, be used to guide municipal and planning decisions, affirming Chief Archibald's statement that "across Canada, municipal governments and neighbouring First Nations are developing stronger relationships."[133] These relationships, aimed at "long-term prosperity and peace" are built through "lasting friendships, relationships and partnerships on the principles of truth and reconciliation."[134]

132 PPS, *supra* note 54, s 4.3.

133 Archibald, *supra* note 4.

134 *Ibid.*